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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MALCOLM JAMAL HAWKINS, JR.,  
  
Defendant and Appellant.

C060245  
  
(Super.Ct.No.  
07F07706)

A jury found that defendant Malcolm Hawkins was guilty of attempted robbery and that he personally used a firearm in committing the offense. The trial court sentenced him to prison for an aggregate term of 12 years and imposed various fines and fees.

On appeal, defendant argues that because the prosecution relied on circumstantial evidence that the firearm was real, not a replica, the court erred in failing to instruct sua sponte that the jury must resolve in defendant's favor conflicting inferences from circumstantial evidence. We shall affirm the judgment.

## FACTS

The pertinent facts are few. The clerk in a convenience store on Florin Road was working his morning shift when he saw a hooded man walk in with a shotgun. The clerk was scared, so he fled to the back of his cashier's booth and lay down on the floor. All he could remember at trial was seeing the gun; he did not recall if the man said anything. The man left after less than a minute without taking anything with him.

A surveillance video showed a person the jury determined was defendant making a purchase. Defendant wore a t-shirt with a distinctive design. The same t-shirt was partially visible when a hooded man walked in moments later with the shotgun. The armed man also wore shorts and shoes similar to those just seen on defendant.

Investigating officers never located the shotgun; but two officers testified it looked like a sawed-off Remington, similar to firearms that they used on the job. The t-shirt seen on the surveillance video was found in the washing machine of a friend of defendant. The aunt of defendant's friend testified that defendant had been staying with her in Merced and Yosemite Lake at the time of the offense.

The trial court's instruction on the use of circumstantial evidence referred only to the element of intent, explaining that the People must prove beyond a reasonable doubt each fact essential to the intent necessary for attempted robbery, and that the jury must give a defendant the benefit of the doubt where it can draw conflicting reasonable conclusions. The court also instructed on

the definition of a firearm in connection with the gun enhancement. In closing argument, defense counsel asserted that nothing connected defendant with the robbery other than a mistaken identification; defendant had a completely different hairstyle and was elsewhere at the time of the crime.

#### DISCUSSION

Relying on a theory that was never explicitly part of his defense in the trial court, defendant argues there was only circumstantial evidence that the object he carried into the convenience store was a real firearm, rather than a replica. He claims the jury reasonably could have concluded from the circumstantial evidence that the object was only a replica and, thus, the court's failure to instruct sua sponte on the principle that the jury must resolve the conflicting conclusions in defendant's favor "had the same effect as a directed verdict [on the gun enhancement] telling the jury the object . . . was an actual firearm."

Defendant acknowledges this court's decision in *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (hereafter *Monjaras*), which explained that where an object *appears* to be a firearm and is *put to that use* in the course of a robbery, the object's appearance and its use by the defendant constitute sufficient circumstantial evidence to support a finding that it was a loaded firearm; and the victim's inability to say whether the gun was real or a replica does not create a reasonable doubt, "as a matter of law," that the gun was a loaded firearm. (*Id.* at p. 1437.)

Defendant attempts to make a distinction between his claim and the one in *Monjaras*, arguing he is raising instructional error rather than a challenge to the sufficiency of the evidence. He misses the point, however. Absent some *affirmative evidence* that a firearm is merely a replica, *Monjaras* held it would *not* be *reasonable* to conclude from the object's appearance and use that it was a replica, not a real gun. Therefore, on this issue, defendant was not entitled to an instruction that the jury must give him the benefit of the doubt in resolving conflicting *reasonable* inferences from circumstantial evidence. (*People v. Wiley* (1976) 18 Cal.3d 162, 175.) Nor, for that matter, could the absence of the instruction have had any possible prejudicial effect on the outcome of his trial.

#### DISPOSITION

The judgment is affirmed.

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SCOTLAND, P. J.

We concur:

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NICHOLSON, J.

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ROBIE, J.